THE UNTOUCHABLES: THE IMPACT OF SOUTH CAROLINA'S NEW JUDICIAL SELECTION SYSTEM ON THE SOUTH CAROLINA SUPREME COURT, 1997–2003

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I. INTRODUCTION

Although South Carolina has perennially been considered one of the nation's most rebellious states, the South Carolina Supreme Court has historically been extremely deferential to precedent.[1] However, in 1997, the South Carolina judicial system experienced a reform that significantly changed the South Carolina Supreme Court's traditional deference to past precedent.[2] As a result of a South Carolina Constitutional amendment, jurists are no longer solely elected by the General Assembly. Rather, a Judicial Merit Selection Commission reviews the qualifications of all applicants and nominates the three most qualified candidates.[3] These three nominees are then voted on by the General Assembly, and the

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[1] On December 20, 1860, South Carolina became the first state to secede from the Union. Shortly thereafter, the nation plunged into a Civil War that was devastating to South Carolina's economy, population, and land. Mary L. Morgan, *A Brief History of South Carolina*, S.C. State Library, *at* http://www.state.sc.us/scsl/brfhist.html (last visited Jan. 20, 2004). From 1987 to 1997, the South Carolina Supreme Court overruled only two previous South Carolina Supreme Court holdings. *See* Woodard v. Westvaco Corp., 460 S.E.2d 392, 394 (S.C. 1995), *overruling* Carter v. Florentine Corp., 423 S.E.2d 112 (1992), Botany Bay Marina, Inc. v. Townsend, 372 S.E.2d 584 (1988), Simms v. Phillips, 24 S.E. 97 (1896); State v. Pickens, 466 S.E.2d 364, 366 n.3 (S.C. 1996), *overruling* State v. McLaughlin, 38 S.E.2d 492 (1946).

[2] *See* S.C. CONST. art. V, § 27 (creating a Judicial Merit Selection Commission). This amendment did not go into effect until June 4, 1997. Consequently, this study focuses on the decisions between 1997 and 2003.

[3] *Id.*; S.C. CODE ANN. §§ 2-19-10(A), -19-35(A), -19-35(B), -19-80(A) (Law. Co-op. Supp. 2003).

nominee with the highest number of votes is appointed to the bench.[4]

While some scholars argue that this change has done little to eliminate the highly political system that the previous method of judicial selection—legislative election—promoted, a look at the court's decisions since the implementation of the new selection system tells a different story.[5] In contrast to the decade prior to the amendment where the court only overruled its own precedent twice, in the period between 1997 and 2003, the South Carolina Supreme Court has overruled its own precedent thirty-six times and defied the United States Supreme Court twice.[6] These numbers attest to the fact that the current bench now decides cases with a sense of independence from the General Assembly, resulting in decisions based upon their individual ideologies, rather than the political tides of the General Assembly. The willingness of the new bench to overrule past precedent indicates that, at least to some degree, the justices are shielded from the political backlash which can result from challenging the status quo in South Carolina.

By examining criminal cases from 1997 through 2003 in which the majority chose to overturn previous case law, as well as discussing the rationale behind the court's decisions to disobey the United States Supreme Court, this study seeks to demonstrate the new trend toward judicial independence, while also identifying the underlying ideology of each jurist. Ultimately, it will be apparent that although the change to the judicial selection system resulted in greater independence for the justices, this independence came at the cost of accountability to the public or the General Assembly: arguably the only two bodies through which jurists are forced to consider the principles of majoritarianism.

II. JUDICIAL SELECTION: SOUTH CAROLINA'S 1996 MERIT SELECTION AMENDMENT

Prior to 1997, the South Carolina General Assembly had statutory authority to elect and re-elect the state's judges and justices.[7] Through a joint committee, members of both houses of the

[4] S.C. CODE ANN. § 2-19-90.

[5] *See, e.g.*, Martin S. Driggers, Note, *South Carolina's Experiment: Legislative Control of Judicial Merit Selection*, 49 S.C.L. REV. 1217, 1235 (1998).

[6] See *infra* app. A for a list of the thirty-six cases overruled, and *infra* notes 136–55 and accompanying text for a discussion of *State v. Shafer* and *State v. Kelly*, the two South Carolina cases defying the United States Supreme Court.

[7] S.C. CODE ANN. § 2-19-10 (Law. Co-op. 1986); *see generally* Kevin Eberle, *Judicial*

legislature reviewed the qualifications of all applicants.[8] However, the statutes enabling the committee to review the candidates did not define the qualifications to be reviewed or how they were to be weighed.[9] Moreover, the committee lacked authority to remove an applicant's name from consideration.[10] Therefore, unqualified applicants remained eligible for appointment. This process at times resulted in unqualified applicants being elected to the bench because members of the General Assembly—provided with little external guidance on the qualifications of the candidates—often elected sitting or former legislators, with whom they had experience.[11] In fact, from 1995 until 2000, all five South Carolina Supreme Court justices had previously served in the General Assembly.[12] Moreover, all of the current justices, with the exception of Justice Pleicones, were elected very shortly after ending their service in the legislature.[13] Although most of the justices first sat on the Circuit Court, current Chief Justice Jean Hoefer Toal was elected directly to the Supreme Court from the legislature.[14]

While this connection did not go unnoticed, the General Assembly was unwilling to add credibility to the selection process and thereby relinquish its power through public elections. However, South Carolina did adopt a modified form of the Missouri Plan for judicial selection.[15] Named for the state that first adopted the system, the

Selection in South Carolina: Who Gets to Judge?, S.C. LAW. 20–22 (May–June 2002).

[8] S.C. CODE ANN. § 2-19-30 (Law. Co-op. 1986).

[9] Driggers, *supra* note 5, at 1227 (stating that the committee had the power to rule on the applicants' qualifications).

[10] *Id.*

[11] *Id.* For example, in 1994, Judge Randall Bell's appointment to the South Carolina Supreme Court was dubbed a "surprise" victory despite service on the Court of Appeals, a professorship, and degrees and honors from several prestigious universities. The reason for the "surprise" was that Judge Bell had never served in the General Assembly. Eberle, *supra* note 7, at 22.

[12] From 1995 until 2000, the bench included Chief Justice Ernest A. Finney, Jr., Justice Jean Hoefer Toal, Justice James E. Moore, Justice John H. Waller, Jr., and Justice E.C. Burnett, III. In 2000, as a result of Chief Justice Finney's retirement, Justice Costa M. Pleicones was appointed, making him the only current Justice to not have served in the General Assembly prior to judicial appointment. *See* South Carolina Judicial Department, Supreme Court, Justices, *at* http://www.judicial.state.sc.us/supreme/displayJustice.cfm (last visited Jan. 20, 2004) [hereinafter Supreme Court Justices] (detailing the careers of Justices Pleicones, Toal, Moore, Waller, and Burnett); THE AMERICAN BENCH: JUDGES OF THE NATION 2152 (Marie T. Finn et al. eds., 9th ed. 1997–98) [hereinafter THE AMERICAN BENCH] (detailing former Chief Justice Ernest A. Finney's career).

[13] *See* Supreme Court Justices, *supra* note 12.

[14] THE AMERICAN BENCH 2222.

[15] Driggers, *supra* note 5, at 1224, 1228–29. A true merit selection system consists of a commission of both lay members and lawyers responsible for recruiting, screening, investigating, and evaluating judicial candidates. *Id.* at 1225. The commission then nominates to the appointing authority a limited number of candidates. *Id.* After

Missouri Plan calls for a panel of appointed commissioners to review the slate of judicial candidates based on merit and nominate for election or appointment those candidates it deems qualified.[16]

Under South Carolina's new system, although the General Assembly retains the final vote on the appointed judge or justice, the Judicial Merit Selection Commission has the sole power to nominate candidates.[17] Unlike a true merit selection system, South Carolina's Commission consists of ten members: three members are selected by the Chairman of the Senate Judiciary Committee, two members are selected by the President Pro Tempore of the Senate, and five members are selected by the Speaker of the House of Representatives.[18] As a result of this system, the appointment of Commission members—while certainly less directly political than the previous system—has a distinct political undertone that perpetuates the presence of political influence on the judiciary.

The judicial selection process begins when the Commission notifies the South Carolina Supreme Court, the South Carolina Bar, and South Carolina newspapers of a vacancy or an attempted re-election by a sitting judge or justice.[19] The Commission then accepts notices of intention from interested candidates who wish to be considered.[20] Upon receiving notice, the Commission investigates the candidates "as it considers appropriate."[21] Through its Judicial Qualifications Committee, the Bar has an opportunity to assess the candidates and provide feedback.[22] In addition to feedback from the Bar, the Commission established Citizens Committees on Judicial Qualifications, which allow the general public to provide feedback on the candidates.[23] Once the investigation is complete, a public hearing is held.[24] Those who are interested in testifying must

appointment, merit-selected judges face unopposed public elections in which voters decide whether the judge is re-elected for another term. *Id.* The commission traditionally consists of seven members: three lawyers chosen by the bar association, three lay members chosen by the governor, and a sitting judge appointed to chair the committee. *Id.*

[16] Eberle, *supra* note 7, at 22.

[17] *See* Driggers, *supra* note 5, at 1231. The General Assembly also retained the power to appoint members to the Commission, placing this responsibility in the hands of only three legislators. *Id.*

[18] *Id.* Of each of the two groups of five, one appointed by the Senate and one by the House of Representatives, three must be General Assembly members and two must be members of the general public. S.C. CODE ANN. § 2-19-10(B) (Law Co-op. Supp. 2003).

[19] S.C. CODE ANN. § 2-19-20(B); Eberle, *supra* note 7, at 22.

[20] Eberle, *supra* note 7, at 22.

[21] S.C. CODE ANN. § 2-19-20(D).

[22] Eberle, *supra* note 7, at 23. The twenty-five lawyer Committee interviews at least thirty people who are familiar with the candidate, and can interview the candidate as well. *Id.*

[23] *Id. at* 24.

[24] *Id.*

provide a copy of their proposed testimony to the Commission at least two days prior to the hearing.[25] The Commission then calls those persons it would like to hear testify, and also has subpoena power to compel testimony from other individuals.[26] Following the hearing, the Commission must report its tentative recommendations, including their rationale.[27]

Unlike the previous system, which provided the General Assembly with no criteria, the 1996 amendment sets forth a non-exhaustive list of specific factors for the Commission to consider.[28] In addition to specific factors, the Commission is instructed to consider "race, gender, national origin, and other demographic factors . . . to ensure nondiscrimination to the greatest extent possible as to all segments of the population of the state."[29] The final report of the Commission—including no more than three nominees—is then submitted to the General Assembly for a vote, with the candidate receiving a majority vote winning the appointment.[30] Jurists seeking appointments for subsequent terms are subject to a qualifications review by the Commission, and if deemed qualified, stand for re-election by the General Assembly.[31]

In contrast to the previous system, the Commission's restricted number of nominees prevents unqualified candidates from reaching the General Assembly.[32] The Commission's nominees are the only ones who may be considered, although the General Assembly has the power to reject the entire slate.[33] Furthermore, legislators are banned from running for judicial office until one year after either leaving the General Assembly or failing to file for re-election to the General Assembly.[34] Moreover, no member of the Commission can be considered for a judicial nomination until one year after leaving the Commission.[35]

Another change, also enacted to lend credibility to the selection

[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] S.C. CODE ANN. § 2-19-35(A) (Law. Co-op. Supp. 2003) (including constitutional qualifications, ethical fitness, professional and academic ability, character, reputation, physical health, mental stability, experience, and judicial temperament).
[29] *Id.* § 2-19-35(B).
[30] *Id.* §§ 2-19-80 (A), -19-90.
[31] *Id.* § 2-19-80(C).
[32] *Id.* § 2-19-80.
[33] *Id.* § 2-19-80(B).
[34] S.C. CODE ANN. § 2-19-70(A).
[35] *Id.* § 2-19-10(G).

system, is a ban on early lobbying and vote trading.[36] Prior to the 1996 amendment, legislators attempted to influence the racial composition of the bench by trading support for candidates.[37] Under the new system, candidates may not seek General Assembly votes, nor may members of the General Assembly offer a pledge of support, prior to the release of the Commission's report.[38] Furthermore, "no member of the General Assembly may offer his pledge . . . to vote for legislation or for other candidates, in exchange for votes for a particular candidate."[39]

Whether the new form of judicial selection creates a more credible judiciary and achieves the necessary balance between accountability and independence will likely remain unsettled. Although opponents of South Carolina's former legislative election process argue that the new system insulates the judiciary from public opinion, proponents of the former system argue that this same insulation comes not only at the expense of accountability to the public, but also creates a system in which the judiciary is obligated to the General Assembly.[40] While proponents of the new system concede that politics are not entirely removed from the judicial selection process, they argue that the Commission serves as a buffer between the candidates and the politically driven General Assembly that elects the judiciary, thereby lessening the impact of politics on the judiciary.[41] While it is at least arguable that the merit selection system may still allow politics to permeate the judiciary, it is apparent from the justices' recent tendency to overturn past precedent and put forth their individual ideologies that the current bench is probably not overly concerned with any political backlash, primarily because of the buffer created by the Commission. As illustrated below—contrary to opponents' arguments—the 1996

[36] *Id.* §2-19-70(D).

[37] *See* Driggers, *supra* note 5, at 1232 n.115 (describing how, after the 1995 judicial elections, several African-American lawmakers admitted to having cut deals to agree not to oppose two different judges, in exchange for the appointment of Circuit Judge Danny Martin, an African-American). As Senator Robert Ford described it, "I had to sell my soul to 10 devils." *Id.* This vote trading transcended racial boundaries. As former Representative Tim Rogers stated, "lawmakers [of all races] agreed to support particular candidates in exchange for backing pet legislation." *Id.*

[38] S.C. CODE ANN. § 2-19-70(C) (Law. Co-op. Supp. 2003).

[39] Eberle, *supra* note 7, at 25.

[40] *See generally* Driggers, *supra* note 5, at 1229–32 (discussing the advantageous nature of a selection committee to remove judicial positions from the direct reach of the legislators, while simultaneously acknowledging that partisan politics play a major role in the election process *after* the Commission has released its report).

[41] *See id.* at 1231 (asserting that the "days may be gone when the intricate system of vote pledging and 'horse trading' could place a questionable candidate on the bench").

amendment has clearly increased the independence of the judiciary, albeit at the cost of the accountability present when the judiciary is subject to either a public election or an unrestrictive Legislative election.

III. THE CURRENT JUSTICES: TRENDS AND IDEOLOGIES[42]

A. Liberal Constructionists: Aligning South Carolina with the National Majority

1. Justice James E. Moore

Justice James E. Moore was elected to the South Carolina Supreme Court in May of 1991, after a public service career which included fifteen years serving on the Circuit Court, an additional fifteen years in private practice, and a four term tenure in the South Carolina House of Representatives.[43] Overruling only one decision from the time of his election to the court in 1991 until 1997, Justice Moore was not immediately insulated by the 1996 amendment, as he was preparing for his 1998 re-election.[44] Justice Moore's political concerns may explain why he wrote only one opinion overruling past precedent in 1997.[45] However, after being elected for another ten-year term in May 1998, Justice Moore wrote thirteen opinions in which he overruled precedent, with six criminal cases, from 1999 through 2003.[46] In these six criminal decisions, two of Justice Moore's tendencies emerge. In the two earliest cases, Justice Moore attempted to bring South Carolina's common law in line with the majority of other states and the federal judiciary. The four later

[42] The discussion that follows details the ideology of each South Carolina Supreme Court Justice, in addition to demonstrating the court's new willingness to overturn past precedent as a result of the 1996 amendment. Although there were thirty-six South Carolina Supreme Court opinions from 1997 through 2003 that overturned past South Carolina Supreme Court precedents, in the interest of brevity, only the criminal cases, totaling fifteen majority opinions and six dissenting opinions, are discussed below. While a table of all of the opinions overruling past decisions can be found in Appendix A, a discussion of the criminal cases makes clear the justices' individual ideologies and the willingness of the court as a whole to disagree with the United States Supreme Court.

[43] *See* Supreme Court Justices, *supra* note 12.

[44] *See* State v. Pickens, 466 S.E.2d 364, 366 n.3 (S.C. 1996), *overruling* State v. McLaughlin, 38 S.E.2d 492 (S.C. 1946). See *supra* notes 2–4 and accompanying text for a general discussion of the 1996 amendment.

[45] *See* Tolemac, Inc. v. United Trading, Inc., 484 S.E.2d 593, 595 (S.C. 1997), *overruling* Frady v. Smith, 147 S.E.2d 412 (S.C. 1966).

[46] *See infra* apps. A & B.

cases suggest a tendency toward pro-defendant opinions.[47]

In 1999, Justice Moore penned two majority opinions overruling previous South Carolina Supreme Court decisions, which suggest a desire to conform with the majority of other state and federal courts. First, in *State v. Short*, the court held that the defendant's peremptory challenges, all exercised against white potential jurors, were not racially motivated in contravention of United States Supreme Court precedent.[48] The defendant, arguing that the jury panel should not have been set aside, convinced the court that he should be granted a new trial because his right to a fair and impartial jury was impeded when the trial court improperly set aside the panel, without a showing that this action prejudiced him.[49] Justice Moore agreed that no showing of actual prejudice was necessary to establish an infringement of the federal statutory right to exercise a peremptory challenge.[50] A clear majority of other state and federal courts did not require a showing of actual prejudice, and regardless of South Carolina's precedent which required a showing of actual prejudice, Justice Moore chose to align South Carolina with the national majority.[51]

Justice Moore again decided to follow the national majority in *Brightman v. State*, a case involving whether or not a defendant was entitled to a *King* charge[52] instructing the jury that if they had doubts as to whether the defendant was guilty of a lessor or greater offense, the case must be resolved in the defendant's favor.[53] In his 1996 *State v. Darby* opinion, Justice Moore upheld the use of language in a jury charge stating that when there is a "real possibility" that the defendant is not guilty, the jury must so decide.[54] Relying on this opinion, Justice Moore in *Brightman*

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[47] The terms *pro-defendant* or *pro-prosecution*, when used to describe the opinions of the various jurists, do not necessarily refer to the outcome in the particular case being discussed, but rather are used to describe the ultimate conclusion of law and results that will likely manifest in later opinions as a result of the rule and/or test announced in the case discussed.

[48] *See* State v. Short, 511 S.E.2d 358, 359, 360 (S.C. 1999), *overruling* State v. Plath, 284 S.E.2d 221 (S.C. 1981).

[49] *See Short*, 511 S.E.2d at 359, 360.

[50] *See id.* at 360.

[51] *See Plath*, 284 S.E.2d at 227 (requiring the defendant to show that he was actually prejudiced by the trial court's refusal to allow him a belated peremptory challenge where his counsel was given two opportunities to strike the juror). Justice Moore supported the court's decision to overrule *Plath* with evidence that South Carolina had been implicitly following the majority rule for some time prior to the *Short* opinion. *See Short*, 511 S.E.2d at 360–61.

[52] *See* State v. King, 155 S.E. 409 (S.C. 1930).

[53] *See* Brightman v. State, 520 S.E.2d 614, 615 n.2, 616 (S.C. 1999), *overruling* State v. King, 155 S.E. 409 (S.C. 1930).

[54] *See* State v. Darby, 477 S.E.2d 710, 711 (S.C. 1996).

stated:

> We have endorsed the definition of reasonable doubt set forth in Justice Ginsburg's concurring opinion in *Victor v. Nebraska*. We now think the time has come to overrule *King*. The *King* charge is unnecessary in light of the modern general reasonable doubt charge which instructs the jury to resolve doubts in favor of the defendant.[55]

However, as then Chief Justice Ernest A. Finney, Jr. pointed out in his separate opinion, the Court "did not either expressly or impliedly approve the charge derived from the Ginsburg suggested charge. We merely held that the reasonable doubt charge, [containing the 'real possibility' language] was not incorrect."[56]

Justice Moore's other notable tendency—to establish law that is inherently pro-defendant—can be seen in the following four opinions. First, in *Jackson v. State*, a 2000 opinion involving the level of proof required to establish ineffective assistance of counsel, Justice Moore overruled *Judge v. State*, a 1996 South Carolina Supreme Court case.[57] In *Jackson*, Justice Moore held that a petitioner's own testimony in a post-conviction relief ("PCR") hearing was sufficient to establish that the petitioner had been prejudiced by his ineffective counsel under the court's *Wolfe v. State* test.[58] In *Wolfe*, then-Associate Justice Jean Hoefer Toal stated that for a petitioner to be granted PCR as a result of having ineffective counsel, the petitioner must show that his counsel was ineffective and that this in some way prejudiced his case.[59] In *Jackson*, the petitioner testified that had his trial counsel informed him that threatening a public official is a felony rather than a lesser offense, he would not have plead guilty.[60] Despite questions regarding the petitioner's credibility, Justice Moore, overruling *Judge* insofar as it held that more proof than a petitioner's own testimony was

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[55] Brightman v. State, 520 S.E.2d at 616 (citation omitted).

[56] *See id.* at 616 (Finney, C.J., concurring in part, dissenting in part). Former Chief Justice Ernest A. Finney, Jr.'s decisions are not discussed in this study, as he is no longer a member of the South Carolina Supreme Court bench. To the extent that Chief Justice Finney's dissents impact the majority opinions discussed in this study, they will be addressed along with those majority opinions.

[57] *See* Jackson v. State, 535 S.E.2d 926, 927 n.2 (S.C. 2000), *overruling* Judge v. State, 471 S.E.2d 146 (S.C. 1996). In *Judge*, the court stated that the prejudice prong of the test for ineffective assistance of counsel must be proven by objective evidence, and that the petitioner's own statement would not qualify due to its self serving nature. *Judge*, 471 S.E.2d at 150.

[58] Jackson v. State, 535 S.E.2d 926, 927 (S.C. 2000) (citing Wolfe v. State, 485 S.E.2d 367 (S.C. 1997)).

[59] *Wolfe*, 485 S.E.2d at 369.

[60] *Jackson*, 535 S.E.2d at 927.

required, held that the petitioner's testimony, standing alone, was sufficient to satisfy the *Wolfe* prejudice requirement.[61]

In a vigorous dissent, Justice Burnett emphasized the fact that the petitioner lacked credibility, and under *Judge v. State*, "[p]rejudice must be shown by *objective* evidence."[62] According to Justice Burnett, Justice Moore's holding effectively "shifts the burden of proof from the applicant in a PCR hearing to the State to introduce evidence contradicting the applicant's self-serving declaration."[63]

Subsequent to the *Jackson* decision, Justice Moore overruled another South Carolina Supreme Court precedent in another pro-defendant holding. *State v. McFadden*, a 2000 case overruling the 1981 *State v. Summers* opinion, involved whether or not a trial court erred in charging a jury with first, second, and third degree Criminal Sexual Conduct ("CSC"), rather than just first degree CSC, in the case of a defendant who allegedly beat and raped a mentally retarded woman.[64] In dictum, *Summers* concluded that third degree CSC is a lesser-included offense of first degree CSC.[65] According to several previous South Carolina Supreme Court opinions, "[t]he test for determining if a crime is a lesser included offense is whether the greater of the two offenses includes all the elements of the lesser offense."[66] In the South Carolina Code, third degree CSC is not a lesser offense of first degree CSC because first degree CSC does not require that the victim be mentally defective or that the actor know or have reason to know the victim is mentally defective.[67] Therefore, Justice Moore concluded, based upon statutory language, that as the legislature provided for lesser-included offenses in other statutes, the legislature's failure to do so in this particular case indicated that there was no legislative intent to include third degree CSC in first degree CSC.[68] Ultimately, the conviction was overturned.

Following in the footsteps of his *McFadden* holding, Justice Moore again wrote for the majority on lesser-included offenses, overruling

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[61] *Id.*

[62] *Id.* at 928 (citing Judge v. State, 471 S.E.2d 146, 150 (S.C. 1996)) (Burnett, J., dissenting).

[63] *Id.* (Burnett, J., dissenting).

[64] *See* State v. McFadden, 539 S.E.2d 387, 388, 389 (S.C. 2000), *overruling* State v. Summers, 274 S.E.2d 427, 429 (S.C. 1981).

[65] *See Summers*, 274 S.E.2d at 429.

[66] *McFadden*, 539 S.E.2d at 389.

[67] *Id.*

[68] *Id.*

three past holdings, in the companion cases of *State v. Parker* and *Joseph v. State*.[69] Using a rationale similar to *McFadden*, Justice Moore stated that grand larceny is not a lesser-included offense of armed robbery because armed robbery does not require that the value of the goods stolen exceed a certain amount, which is a necessary element of grand larceny.[70] In *Parker*, the defendant was indicted for armed robbery; however, the trial court agreed to charge the jury on grand larceny, a crime the trial court considered a lesser-included offense.[71] Ultimately, the defendant was found guilty of grand larceny.[72] In *Joseph*, although the defendant was indicted for armed robbery, he pled guilty to grand larceny.[73] Like *Parker*, the plea court in *Joseph* considered grand larceny a lesser-included offense of armed robbery, and therefore accepted the defendant's guilty plea.[74] Despite these factual differences, Justice Moore's conclusion was the same in both cases. Consequently, both grand larceny convictions were overturned.[75]

As in *McFadden*, Justice Burnett argued in dissent in both *Parker* and *Joseph* that the lower court decisions should not be disturbed because precedent clearly states that larceny is a lesser-included offense of robbery.[76] According to Justice Burnett, the basic element of robbery and larceny is the same, that being "the felonious taking and carrying away of the goods of another against the will or without the consent of the other."[77] Moreover, as the term "grand" is not an element of grand larceny, but rather a term used to distinguish various levels of larceny for sentencing purposes, grand larceny is not a "unique substantive crime" but rather a sub-

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[69] *See* State v. Parker, 571 S.E.2d 288 (S.C. 2002); Joseph v. State, 571 S.E.2d 280 (S.C. 2002). Together, these cases overrule State v. Lawson, 305 S.E.2d 249 (S.C. 1983); Young v. State, 192 S.E.2d 212 (S.C. 1972); State v. Ziegler, 260 S.E.2d 182 (S.C. 1979). *See Parker*, 571 S.E.2d at 290; *Joseph*, 571 S.E.2d at 282–83.

[70] The value of the goods taken in a grand larceny prosecution must be greater than $1,000. *Parker*, 571 S.E.2d at 289 n.3; *Joseph*, 571 S.E.2d at 282 n.2.

[71] *Parker*, 571 S.E.2d at 288 (Burnett, J., dissenting).

[72] *Id.* at 289.

[73] *Joseph*, 571 S.E.2d at 281.

[74] *Id.*

[75] *Parker*, 571 S.E.2d at 290–91; *Joseph*, 571 S.E.2d at 283. In *Parker*, the defendant was only charged with grand larceny, and therefore his entire conviction was overturned. However, in *Joseph*, the defendant was also charged with murder, and as there was no error with respect to the murder conviction, the murder conviction was upheld. *Joseph*, 571 S.E.2d at 286.

[76] *Parker*, 571 S.E.2d at 291–92 (Burnett, J., dissenting); *Joseph*, 571 S.E.2d at 287 (Burnett, J., dissenting).

[77] *Parker*, 571 S.E.2d at 291 (Burnett, J., dissenting); *Joseph*, 571 S.E.2d at 287 (Burnett, J., dissenting).

category of the crime of larceny.[78] Consequently, as the basic element is the same, "larceny is subsumed in the offense of robbery; larceny is robbery accomplished without force."[79] However, despite Justice Burnett's vehement dissents, Justice Moore's conclusion to the contrary remains the law in South Carolina.

From these four cases, an argument can be made that Justice Moore is exhibiting a pro-defendant ideology.[80] Additionally, it appears as though he would prefer South Carolina to align its decisions with the national majority: however, Justice Moore's underlying rationale remains unclear.[81] As Justice Moore's tendency to overrule past precedent is recent, it can reasonably be concluded that Justice Moore is not only attempting to leave his legacy on the South Carolina Supreme Court, but that he also feels comfortable doing so in light of the protection provided by the new judicial selection system.[82]

2. Justice John H. Waller, Jr.

Justice John H. Waller, Jr., appointed to the bench in 1994, overruled past precedent nine times from 1997 through 2003, four of which were in criminal cases.[83] While clearly having overruled fewer cases than Justice Moore, the fact that Justice Waller did not pen *any* opinions overruling previous case law prior to 1997 also suggests that his recent tendency to overrule past precedent may be a result of the merit selection system. However, Justice Waller's

[78] *Id.*

[79] *Parker*, 571 S.E.2d at 292 (Burnett, J., dissenting); *Joseph*, 571 S.E.2d at 287 (Burnett, J., dissenting).

[80] Again, Justice Moore's pro-defendant ideology is demonstrated not through his treatment of a particular defendant, but rather through his generally pro-defendant interpretation of the law.

[81] In none of the cases does Justice Moore explain his decision to overrule past precedent, but rather he seems to rely on his own interpretation of the law as sufficient support for his decisions.

[82] While it is convincing that Justice Moore's recent trend in overruling past precedent is a result of the new judicial selection system, another explanation for Justice Moore's recent activity could be his age. Justice Moore is currently sixty-eight-years old and will turn seventy-two in the same year his current term is set to expire. Supreme Court Justices, *supra* note 12; Judicial Selection in the States, South Carolina, Current Methods of Judicial Selection, *at* http://www.ajs.org/js/SC_methods.htm (last visited February 29, 2004) [hereinafter Judicial Selection in the States]. As the mandatory retirement age for South Carolina Supreme Court justices is seventy-two, Justice Moore's recent disregard for past precedent could also be the result of his inability to be elected for another term. Judicial Selection in the States. However, considering the similar behavior of the other justices who will likely face re-election, it is more likely that Justice Moore's behavior is likewise attributable to the new selection system.

[83] *See* Supreme Court Justices, *supra* note 12; *infra* app. A & B.

opinions often have more clearly articulated rationales than those of Justice Moore. Having served in the General Assembly for thirteen years, one year serving as the Majority Leader of the House of Representatives, Justice Waller is arguably the most confident in discerning legislative intent.[84]

In 1997, Justice Waller wrote the majority opinion in *State v. Easler*, a case involving successive prosecution and multiple punishments where a defendant was charged with felony driving under the influence causing great bodily injury and assault and battery of a high and aggravated nature based on a single car accident.[85] In *Easler*, Justice Waller aligned the court with the national majority on these issues as they implicate double jeopardy.[86] Justice Waller was called upon to determine whether to afford the defendant more protection under South Carolina's double jeopardy clause than the United States Supreme Court required in *Blockburger*.[87]

South Carolina's precedent would have found a double jeopardy violation even where the crimes did not have the same elements, where to establish proof of the second offense, the government would necessarily have to prove conduct for which the defendant was already punished.[88] Justice Waller abandoned South Carolina's standard giving heightened protection, by finding that the *Blockburger* "same elements" test is "the only remaining test for determining a double jeopardy violation, in both multiple punishment and successive prosecution cases."[89] As *Blockburger* held, the test to determine whether an act constitutes more than one offense is whether each statutory provision allegedly violated requires proof of an *additional* fact which the other does not.[90] Consequently, to the extent that *Walsh* could be read as following a "same conduct" test, *Walsh* was overruled.[91]

Also aligning South Carolina with the national majority, in *State v. Collins*, despite overturning a conviction, Justice Waller retroactively applied his newly created precedent, and held that

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[84] *See* Supreme Court Justices, *supra* note 12; *see also* State v. Gordon, 588 S.E.2d 105, 110 (S.C. 2003) (outlining rules of statutory construction and interpretation).

[85] *See* State v. Easler, 489 S.E.2d 617, 619, 622–23 (S.C. 1997), *overruling* State v. Walsh, 388 S.E.2d 777, 779 (S.C. 1988).

[86] *Easler*, 489 S.E.2d at 622–23.

[87] *Id.* at 622.

[88] *Id.*

[89] *Id.* at 623 (citing Blockburger v. United States, 284 U.S. 299, 304 (1932)).

[90] *Id.* at 622.

[91] *Id.* at 623 n.14.

"absence is not an essential element of the offense of accessory after the fact and that 'mere presence' at the scene will not preclude an accessory verdict where the defendant becomes involved after commission of the substantive offense."[92] Although he conceded that South Carolina's precedent did not allow for an accessory charge where the defendant was absent from the crime scene, Justice Waller relied on several cases from other states and criminal law treatises to modify existing case law in conformance with the current majority.[93]

In a rather convoluted case, *Al-Shabazz v. State*, involving whether or not a prisoner could raise issues involving credits and solitary confinement in a PCR proceeding, Justice Waller overruled four decisions—with little explanation—in just one paragraph.[94] Mentioning two cases where the court held that it is improper to raise "issues of solitary confinement and downgrading of custody status" at PCR proceedings, Justice Waller added "credits-related issues and other conditions of imprisonment" to the list of improper arenas for administrative tribunals.[95] Unlike in his previous decisions, in *Al-Shabazz*, Justice Waller provided no support for this change, except to say that the precedents are overruled at least "to the extent they stand for the proposition that credits-related issues or conditions of imprisonment may be raised in a PCR proceeding."[96] In a concurring opinion, then Chief Justice Finney opined that PCR proceedings are a "confused area of the law."[97] Nevertheless, Justice Waller offered very little to clarify the confusion, nor did he offer support for overruling the precedents.

Most recently, in October 2003, Justice Waller overruled *State v.*

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[92] State v. Collins, 495 S.E.2d 202, 203–05 (S.C. 1998) (finding that Collins could be convicted of accessory after the fact of a crime, even if the jury believed that when he arrived with the co-defendant at the convenience store he did not know that the co-defendant intended to rob the store and kill the store clerk, because he offered assistance after the fact by "cover[ing]" for the co-defendant).

[93] *Id.* at 204–05.

[94] *See* Al-Shabazz v. State, 527 S.E.2d 742, 746, 749–50 (S.C. 1999), *overruling* Busby v. Moore, 498 S.E.2d 883, 884 (S.C. 1998) (holding that prisoners are not permitted to have credits applied for good behavior at the beginning of their sentence); Harris v. State, 424 S.E.2d 509, 511 (S.C. 1992) (holding that a defendant is not disadvantaged by not being able to earn good behavior or work credits); Elmore v. State, 409 S.E.2d 397, 399 (S.C. 1991) (holding that while subsequent legislation reducing prisoners' work credits would violate the ex post facto clauses, the defendant in this case was not entitled to work credits because no law at the time of his offense allowed for them); Simmons v. State, 446 S.E.2d 436, 436–37 (S.C. 1994) (holding that a PCR judge had jurisdiction to decide a claim of wrongful denial of work release).

[95] *Al-Shabazz*, 527 S.E.2d at 749–50.

[96] *Id.* at 750.

[97] *Id.* at 758 (Finney, C.J., concurring).

Benjamin—decided just a few months prior—in a rare occurrence of a current justice overruling another current justice's recent opinion.[98] The South Carolina statute at issue in these cases was S.C. Code Ann. § 17-25-50, which provides that where there are a number of offenses committed closely enough in time, they must be treated as one offense.[99] In *State v. Gordon*,[100] a case interpreting South Carolina's recidivist statute providing for the punishment of habitual and repeat criminals, Justice Waller, over Justice Burnett's vehement dissent, overruled Justice Costa M. Pleicones' previous holding in *Benjamin*.[101] *Benjamin* had relied on the language of the recidivist statute which stated that, "[n]otwithstanding any other provision of law [certain defendants] shall be sentenced to life in prison," as evidence of the fact that § 17-25-50 should not be considered for purposes of the recidivist statute.[102] In effect, Justice Waller reiterated his dissenting opinion in *Benjamin* by stating, "[s]tatutes which are part of the same legislative scheme should be construed together."[103] Despite Justice Pleicones' earlier decision that the South Carolina recidivist statute must be considered independent of any other statutes, Justice Waller relied on previous precedent, which called for two of South Carolina's statutes to be construed together.[104] In a scathing comment directed at the earlier majority, Justice Waller remained true to his legislative and strict statutory interpretation roots by stating:

> The *Benjamin* majority ignores these precedents and holds, under the guise of statutory construction, that it is no longer appropriate or necessary to harmonize or reconcile § 17-25-45 with § 17-25-50. Under the majority's rationale, however, S.C.Code Ann. § 17-25-50 is rendered a nullity. This cannot have been the intent of the Legislature; if it had intended to repeal § 17-25-50, it could have plainly said so.[105]

With Acting Justice Marc H. Westbrook replacing Justice Pleicones in this case, Justice Burnett was the voice of dissent, stating that "even when a judge dislikes the result, stare decisis

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[98] *See* State v. Benjamin, 579 S.E.2d 289 (S.C. 2003), *overruled by* State v. Gordon, 588 S.E.2d 105 (S.C. 2003).

[99] *See Gordon*, 588 S.E.2d at 108 n.4.

[100] 588 S.E.2d 105 (S.C. 2003).

[101] *Id.* at 110–11.

[102] *See Benjamin*, 579 S.E.2d at 290–91 (quoting 1982 Act No. 358, §1.A).

[103] *Gordon*, 588 S.E.2d at 110; *Benjamin*, 579 S.E.2d at 292 (Waller, J., dissenting).

[104] *Id.* at 110–11.

[105] *Id.* at 110 (citation omitted).

behoves [sic] him to follow precedent."[106]

Justice Waller, despite heavy reliance on legislative intent and black letter law to support his decisions, often shows little deference to the principle of stare decisis. Like Justice Moore, Justice Waller is not concerned with strict adherence to stare decisis, nor does he provide any meaningful justification for ideological ease in overturning past precedent. Rather, as seen in *Gordon*, Justice Waller masks his decisions under his own self-defined statutory construction. Justice Waller, like Justice Moore, did not overrule any precedent prior to 1997. It may be that Justice Waller's recent tendency to overturn past precedent is also attributable to the new judicial selection process that serves to insulate him from his former peers in the General Assembly.[107]

B. Conservative Tendencies: Faithfulness to Precedent and Stare Decisis

1. Justice E. C. Burnett, III

Having written the most dissenting opinions in the cases studied—three dissenting opinions to Justice Moore's majority opinions and one dissenting opinion to Justice Waller's majority opinion—it appears that Justice E.C. Burnett, III is not only predominately pro-prosecution in criminal cases, but he is also committed to upholding past precedent on the principle of stare decisis.[108] Although Justice Burnett has himself overturned past precedent five times from 1997 through 2003—suggesting that he too acts with little fear of the General Assembly—he remains slightly more conservative than Justice Moore and Justice Waller in disregarding past precedent.[109] Appointed to the bench in April,

[106] *Id.* at 111 (Burnett, J., concurring in part, dissenting in part).

[107] Like Justice Moore, Justice Waller will reach the mandatory retirement age at approximately the same time his current term is set to expire. Supreme Court Justices, *supra* note 12; Judicial Selection in the States. Consequently, as Justice Waller is not eligible for re-election, his recent tendency to disregard past precedent may be a result of his inability to be re-elected. However, given the fact that Justice Waller had begun to overturn past precedent following the passing of the amendment and prior to his re-election in 2002, it is more likely that his continued tendency to overturn past precedent is the result of the new selection system rather than his nearing of the mandatory retirement age. Judicial Selection in the States.

[108] See notes 62–63 and accompanying text for Justice Burnett's dissent in *Jackson*; notes 76–79 and accompanying text for Justice Burnett's dissenting opinions in Parker and Joseph; note 103 and accompanying text for Justice Burnett's dissent in *Gordon*.

[109] *See infra* app. A.

1995, Justice Burnett has overruled past precedent twice in criminal cases, and typically writes his decisions and dissents on black letter law.[110]

In *Stevenson v. State*—a criminal case involving how to construe multiple offenses for purposes of the double jeopardy clause—Justice Burnett overruled *State v. Hollman*, a 1958 South Carolina Supreme Court case that incorrectly applied the United States Supreme Court's 1932 *Blockburger* holding.[111] Despite the *Blockburger* ruling by the United States Supreme Court, according to the *Stevenson* court, the South Carolina Supreme Court had held in *State v. Hollman* that the Court could look at the "actual proof offered at trial in reaching its decision" rather than simply mechanically apply the elements of the offense to the facts of the case.[112] However, as *Blockburger* and several state court cases have held, the "same elements" test should be strictly applied and the facts of the specific case should not be the focus of the decision.[113] Relying on Justice Waller's strict application of the "same elements" test in *Easler*, Justice Burnett overruled *Hollman*, as inconsistent with *Blockburger* and *Easler*.[114] Despite Justice Burnett's sound legal analysis, then Chief Justice Finney penned a dissent. In essence, Chief Justice Finney wanted to uphold *Hollman* because he believed the facts of the case should be considered and stated that the petitioner's post-conviction relief application should be approved due to the factual similarity between this case and *Hollman*.[115]

In a dichotomous case, *State v. 192 Coin-Operated Video Game Machines*, involving the seizure and destruction of illegal video

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[110] *See* Supreme Court Justices, *supra* note 12; *infra* app. B.

[111] Stevenson v. State, 516 S.E.2d 434, 436–37 (S.C. 1999), *overruling* State v. Hollman, 102 S.E.2d 873 (S.C. 1958). The United States Supreme Court, in *Blockburger v. United States*, had held that "where the same act or transaction constitutes a violation of two distinct statutory provisions"—thereby allowing for the imposition of two separate penalties—the critical issue "is whether each provision requires proof of a fact that the other does not." 284 U.S. 299, 305 (1932). The *Hollman* court stated, "[i]t is oversimplification to say that 'the test of identity of offenses is whether the same evidence is required to sustain them' . . . . It must be reasonably applied; inflexible literality in its interpretation can lead to absurdity." 102 S.E.2d at 883. See *supra* notes 74–80 for further discussion of *Blockburger*.

[112] *Stevenson*, 516 S.E.2d at 437.

[113] *See id.* at 437 n.5 (listing Arizona, Connecticut, and Florida state courts as those that strictly apply the "same elements" test).

[114] *Id.* at 437 (citing State v. Easler, 489 S.E.2d 617 (S.C. 1997)). *State v. Easler* applied the *Blockburger* same elements test to reach the conclusion that felony DUI and assault and battery of high and aggravated nature are separate offenses for which the defendant is subject to multiple punishments. 489 S.E.2d at 622–24.

[115] *Stevenson*, 516 S.E.2d at 438 (Finney, C.J., dissenting) (indicating that in both cases the defendants were convicted of the same crimes—resisting an officer and assault and battery with intent to kill).

game machines, Justice Burnett both upheld and overruled previous South Carolina Supreme Court decisions.[116] On the one hand, Justice Burnett relied on the principle of stare decisis to uphold *Squires v. South Carolina Law Enforcement Division*, which held that illegal gambling machines can be seized whether or not they are operational.[117] On the other hand, Justice Burnett overruled *State v. Kizer*, which held that illegal property may be destroyed without giving the owner a chance to contest the illegality of the property.[118] In upholding *Squires*, Justice Burnett implicitly relied on Justice Toal's statement in *State v. One Coin-Operated Video Game Machine*:

> *Stare decisis* exists to "insure a quality of justice which results from certainty and stability". . . . Moreover, our adherence to *stare decisis* in this case does not implicate the risk of the "petrifying rigidity" in the law that can result from too firm an adherence to the doctrine. Because we are adhering to our earlier interpretation of a *statute*, the General Assembly is free to correct any misinterpretation on our part.[119]

Justice Burnett heeded Justice Toal's advice of "avoiding the risk of the petrifying rigidity" in the law by overruling *Kizer*.[120] Justice Burnett, in overruling *Kizer*, found that any interpretation of the South Carolina Code allowing for the destruction of property without a chance to contest the destruction violated the due process rights of the owner.[121] Consequently, Justice Burnett stated, "[a] possible constitutional construction of a statute must prevail over an unconstitutional interpretation."[122] Although this correction of faulty statutory interpretation is seemingly pro-defendant, Justice Burnett ultimately found—based on the facts of the case—that the defendant's due process rights had not been violated, and ultimately decided in favor of the State.[123]

As seen throughout his cases, although willing to overturn past precedent in favor of current statutory interpretation, Justice Burnett is more conservative than both Justice Moore and Justice Waller on issues of precedent. Typically finding for the prosecution,

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[116] State v. 192 Coin-Operated Video Game Mach., 525 S.E.2d 872, 878, 883 (S.C. 2000).

[117] *Id.* at 878, *upholding* Squires v. South Carolina Law Enforcement Div., 155 S.E.2d 859, 860 (S.C. 1967).

[118] *Id.* at 883, *overruling* State v. Kizer, 162 S.E. 444 (S.C. 1967).

[119] State v. One Coin-Operated Video Game Mach., 467 S.E.2d 443, 446 (1996).

[120] *192 Coin-Operated Video Game Mach.*, 525 S.E.2d at 883.

[121] *See id.*

[122] *Id.* (quoting Henderson v. Evans, 232 S.E.2d 331, 333–34 (S.C. 1977)).

[123] *Id.*

Justice Burnett appears to be conservative in his opinions. However, a glimpse into South Carolina's statutes reveals that South Carolina, in general, is a conservative state.[124] Therefore, Justice Burnett's tendency to side with the State may result from his dedication to a state code that is inherently conservative. However, Justice Burnett's willingness to overturn past precedent should not be overlooked. Rather, it serves to demonstrate that although seemingly conservative, Justice Burnett is not reluctant to use the protective shield of the judicial selection process when seemingly necessary to promote his conservative interpretation of the law and his judicial ideologies.

2. Chief Justice Jean Hoefer Toal

Chief Justice Jean Hoefer Toal was elected directly to the South Carolina Supreme Court from the General Assembly in March 1988.[125] Former Associate Justice Toal was re-elected in February 1996 and designated Chief Justice in March 2000, making her the first female member of the Court and the first female Chief Justice.[126] As is apparent from Chief Justice Toal's opinion in *One Coin-Operated Video Game Machine*, she, unlike Justice Moore or Justice Waller, is a staunch supporter of stare decisis, having only overruled past precedent four times in her tenure, of which two were criminal cases.[127] Moreover, even when Chief Justice Toal does overturn past precedent, it is seemingly done for the purpose of clarifying the law created by the previous case.

For example, in *Robinson v. State*, then Associate Justice Toal overruled *State v. Furman* "to the extent that it suggests that only an order specifying [that sentences in two different states are to run concurrently] is required for the convict to receive a concurrent sentence."[128] To support this position, Justice Toal cited several other South Carolina Supreme Court cases, as well as South Carolina Code, which indicated that in order for a convict to receive credit for a concurrent sentence: (1) the South Carolina Department

[124] *See, e.g.*, S.C. CODE ANN. §16-15-120 (Law. Co-op. 2003) (criminalizing "the abominable crime of buggery, whether with mankind or with beast"); S.C. CODE ANN. §59-63-260 (Law. Co-op. 1976) (allowing a school's governing body to use corporal punishment "for any pupil that it deems just and proper").

[125] Supreme Court Justices, *supra* note 12.

[126] *Id.*

[127] *See infra* app. A & B; *see generally* State v. One Coin-Operated Video Game Mach., 467 S.E.2d 443 (S.C. 1996).

[128] *See* Robinson v. State, 495 S.E.2d 433, 436 (S.C. 1998), *overruling* State v. Furman, 341 S.E.2d 795 (S.C. 1986).

of Corrections must receive an order specifying that the sentencing should run concurrently; and (2) the convict must actually be in the custody of the South Carolina Department of Corrections.[129] By overruling *Furman*, Justice Toal made clear South Carolina's requirements for concurrent sentences.

Similarly, in *State v. Kennerly*, then Associate Justice Toal overruled two previous South Carolina Supreme Court decisions "to the extent these cases hold tampering with a jury pool is constructive contempt" rather than direct contempt.[130] Again citing several South Carolina Supreme Court opinions, as well as opinions from other state courts, Justice Toal clarified that direct contempt occurs when the contempt is committed in the presence of the court.[131] As defined by the South Carolina Supreme Court in *State v. Goff*, the court "consists not of the judge, the jury, or the jury room individually, but all of these combined. The court is present wherever any of its constituent parts is engaged in the prosecution of the business of the court according to the law."[132]

As is apparent from the lack of opinions penned by Justice Toal in which past precedent is overturned, Chief Justice Toal is seemingly more faithful to the concept of stare decisis. The fact that Chief Justice Toal endured a tumultuous re-election in 1996 and is coming up for re-election again in June 2004 may play a role in Chief Justice Toal's conformity.[133] It is noteworthy that Chief Justice Toal is not the author of any dissenting opinions in the cases analyzed, and yet she is seemingly willing to go along with her associates' decisions to overrule past precedent. It will be interesting to see if Chief Justice Toal becomes more active in leaving her legacy on the South Carolina Supreme Court if she is re-elected in 2004.

C. Product of the New System

1. Justice Costa M. Pleicones

Unlike Justice Bell who came just six years before him, Justice

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[129] *See id.* at 435–36 (citing several cases in which the defendant's sentences were not construed as running concurrently because the defendant was not delivered into the custody of the appropriate authorities); *see* S.C. CODE ANN. §24-13-40 (Law. Co-op 1976) (providing time computations for prison sentences).

[130] *See* State v. Kennerly, 524 S.E.2d 837, 839 (S.C. 1999), *overruling* State v. Johnson, 152 S.E.2d 669 (1967), State v. Weinberg, 92 S.E.2d 842 (S.C. 1956).

[131] *Id.* at 838–39.

[132] *Id.* at 838 (citing State v. Goff, 88 S.E.2d 788, 792 (S.C. 1955)).

[133] *See* Driggers, *supra* note 5, at 1217–18; Supreme Court Justices, *supra* note 12.

Costa M. Pleicones' appointment to the bench in February 2000 was not a surprise—considering his qualifications—despite the fact that he too did not serve in the General Assembly prior to appointment.[134] In fact, Justice Pleicones is the only sitting Justice to never have served in the General Assembly.[135] The only currently sitting justice to have been appointed under the new judicial selection system, Justice Pleicones has overturned more past precedent in his first three years on the bench than his colleagues did in all of their first three years combined.[136] In fact, none of the other four justices overturned any past precedents in their first three years on the bench, while Justice Pleicones has overturned past precedent three times, one of which was a criminal case.[137] While this one criminal case is not sufficient to show any trend in Justice Pleicones decisional ideologies, the fact that Justice Pleicones has been so vocal in his first three years may speak to the insulation and independence the justices are now experiencing as a result of the new judicial selection process. As with Chief Justice Toal, it would be premature to conclude that Justice Pleicones will continue to overrule past precedent at his current rate. However, if Justice Pleicones' tendency continues, it could signify the ushering in of a new era for the South Carolina Supreme Court as a result of the new selection system.

IV. RESISTING THE UNITED STATES SUPREME COURT'S DECISIONAL CURRENT

A discussion of the South Carolina Supreme Court's insulation and independence would be incomplete without a mention of *State v. Simmons*,[138] *State v. Shafer*,[139] and *State v. Kelly*[140]—three related cases in which the United States Supreme Court overruled the

[134] Supreme Court Justices, *supra* note 12 (including, among other credentials, service in the Judge Advocate's General Corps, service as a public defender in Richland County, South Carolina, private practice, a municipal judgeship, and a tenure on the South Carolina's 5th Judicial Circuit); Eberle, *supra* note 7, at 24–25.

[135] Supreme Court Justices, *supra* note 12.

[136] *See infra* app. A. The failure of the other justices to overturn past precedent in their first three years on the bench was recognized through a Westlaw search within the time span of 1987 through 2003.

[137] *Id.* See *State v. Watson*, 563 S.E.2d 336, 338 (S.C. 2002), overruling *State v. Reid*, 476 S.E.2d 695 (1996) because, in dictum, it stated that reckless homicide was a lesser-included offense of murder.

[138] 427 S.E.2d 175 (S.C. 1993), *overruled by* Simmons v. South Carolina, 512 U.S. 154 (1994).

[139] 531 S.E.2d 524 (S.C. 2000), *overruled by* Shafer v. South Carolina, 532 U.S. 36 (2001).

[140] 540 S.E.2d 851 (S.C. 2001), *overruled by* Kelly v. South Carolina, 534 U.S. 246 (2002).

South Carolina Supreme Court.

The South Carolina Court's odyssey began in 1993 with *State v. Simmons*.[141] Here, the court, in an opinion written by Justice Moore, held that the trial judge's decision, which did not allow the defense to instruct the jury that the defendant would be sentenced to life in prison without parole if they did not impose the death penalty, was not in error.[142] At the United States Supreme Court, despite vigorous dissents by Justices Antonin Scalia and Clarence Thomas, the other seven Justices agreed to strike down Simmons's death sentence.[143] Four Justices, led by Justice Harry Blackmun, found that due process requires that the jury be informed, specifically via jury instruction, of the defendant's parole ineligibility when the defendant's future dangerousness is an issue.[144] Three other Justices, in a concurring opinion penned by Justice Sandra Day O'Connor, agreed with Justice Blackmun's holding, but Justice O'Connor stated that this information could be provided *either* by argument or instruction.[145]

Although South Carolina changed its sentencing scheme as a result of the United States Supreme Court's *Simmons* decision,[146] the new law was not compliant with the United States Supreme Court's directive prescribing the elements on which the jury should be informed. In an opinion by Justice Burnett, the South Carolina Supreme Court held in *State v. Shafer*[147] that "because life without the possibility of parole is not the only legally available sentencing alternative to death" under the new sentencing scheme, the trial judge did not err in refusing to give the instruction required by

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[141] 427 S.E.2d 175 (S.C. 1993).

[142] *See id.* at 179 (concluding that the jury charge given at the trial level, even though it was devoid of any parole eligibility mention, "satisfie[d] in substance appellant's request for a charge on parole ineligibility"). The court did remark that the trial judge mistakenly refused to furnish a "plain meaning charge" upon the defendant's request, which, the court emphasized, was required under well-established state jurisprudence. *See id.* According to the court's language, however, this error was cured when the trial judge answered the jury's question concerning parole eligibility by instructing that eligibility was not to be considered when reaching a verdict. *Id.* By way of the jury charge sufficiency test employed by the court, which evaluated the charge based on "what a reasonable juror would have understood the charge to mean," Justice Moore determined that a jury would have understood the language of "life imprisonment" to undoubtedly denote "life without parole." *Id.*

[143] *See Simmons*, 512 U.S. at 171.

[144] *Id.* (finding that due process is offended if such an instruction is not given and chastising the South Carolina Supreme Court for "creat[ing] a false dilemma by advancing generalized arguments regarding the defendant's future dangerousness, while at the same time, preventing the jury from learning that the defendant never will be released on parole").

[145] *Id.* at 178 (O'Connor, J., concurring).

[146] *See* S.C. CODE ANN. § 16-3-20(A)-(C) (Supp. 2003).

[147] 531 S.E.2d 524 (S.C. 2000).

Simmons.[148]

The United States Supreme Court disagreed, pointing out that because the jury had found an aggravating circumstance, the only available alternative to the death penalty was life imprisonment without parole, and the parole ineligibility instruction must be given.[149] Moreover, even if the jury could have sentenced the defendant to a lesser sentence, the jury still should have been instructed that a life sentence means life without the possibility of parole.[150] Justice Ginsburg, writing for the Court, stated, "South Carolina has *consistently* refused to inform the jury of a capital defendant's parole eligibility status."[151]

Again, believing that the *State v. Kelly*[152] case could be distinguished from the *Simmons* and *Shafer* cases, the South Carolina Supreme Court affirmed a defendant's death sentence in the absence of a *Simmons* instruction.[153] In an opinion by Justice Waller, the court stated that because the defendant's future dangerousness was not at issue, and because life without parole was not the only alternative to the death penalty, a *Simmons* instruction was not necessary.[154] On review, Justice David Souter decided that a *Simmons* instruction was necessary, as "[a] jury hearing evidence of a defendant's demonstrated propensity for violence reasonably will conclude that he presents a risk of violent behavior, whether locked up or free, and whether free as a fugitive or as a parolee."[155] Consequently, the United States Supreme Court overruled a South Carolina Supreme Court decision for the third time on the very same issue.

While Justice Moore's 1993 opinion can be excluded from identifiable decisional defiance because he was working without United States Supreme Court precedent, Justice Burnett and Justice Waller's opinions demonstrate the current South Carolina Supreme Court's perceived insulation from accountability to the authoritative body. As far back as 1964, the United States Supreme Court said, in an opinion overruling a South Carolina Supreme Court holding, "[a] rule based upon the Constitution of the United States . . . , under the Supremacy Clause, is binding upon state

[148] *Id.* at 528.
[149] *Shafer v. South Carolina*, 532 U.S. at 49–50.
[150] *Id.* at 51.
[151] *Id.* at 48 (emphasis added).
[152] *State v. Kelly*, 540 S.E.2d 851 (S.C. 2001).
[153] *See id.* at 857–58, 862.
[154] *Id.* at 857.
[155] Kelly v. South Carolina, 534 U.S. 246, 253–54 (2002).

courts as well as upon federal courts."[156] As *Simmons*, *Shafer*, and *Kelly* involved a violation of a defendant's due process rights under the United States Constitution, the United States Supreme Court's holdings in all three cases are binding on the South Carolina Supreme Court. Despite this long-standing warning, however, Justice Burnett and Justice Waller still chose to avoid strict compliance with the United States Supreme Court's ruling. While the South Carolina Supreme Court justices have been quick to overturn past precedent since the implementation of the new judicial selection system, when their precedent is challenged by an outside force, such as the United States Supreme Court, the South Carolina justices are ever loyal to their brethren and the South Carolina Code.

V. CONCLUSION

Whether overturning past precedent or defying the United States Supreme Court, the South Carolina Supreme Court maintains a relatively impenetrable and united front. Although six dissenting opinions in the fifteen cases analyzed display a significant ideological difference on the South Carolina Supreme Court, the threads that weave and hold the current South Carolina Supreme Court together are far stronger than any dissention.[157] The web of connections among the South Carolina Supreme Court's justices, in conjunction with the new judicial selection process that at least in part allows the justices a new freedom to express their individual ideologies, is arguably why the current court has taken the opportunity to overrule past precedent and defy the United States Supreme Court, while always remaining loyal to their brothers and sisters of the current bench.

It is unlikely that a loss of accountability to any body, be it legislative, public, or judicial, was the intention of the legislature when ratifying the amendment. However, it is clear that increased independence from the traditional system of legislative elections

[156] *See* Henry v. City of Rock Hill, 376 U.S. 776, 777 n.* (1964).

[157] For example, all five current justices are native South Carolinians. *See* Supreme Court Justices, *supra* note 12. Moreover, four out of five justices served in the General Assembly, at the same time, prior to being elected to the bench. *Id.* Additionally, three out of the five attended Wofford College for their undergraduate degree, University of South Carolina Law School for their law degree, and served in the United States Army. *Id.* When looking solely at University of South Carolina Law School graduates, four out of five satisfy that criteria. *Id.* In fact, the only obvious difference amongst the members of the bench, other than Chief Justice Toal's gender, is their religious affiliations. *Id.*

was necessary to preserve the integrity of the South Carolina judiciary. Whether this integrity has been restored as a result of the change to the judicial selection process, or whether its reputation has been further tarnished as a result of the current bench's disregard for past precedent and the holdings of the United States Supreme Court remains to be seen.

APPENDIX A

Cases Overruling Past Precedent: 1997–2003

Justice James E. Moore

Tolemac, Inc. v. United Trading, Inc., 484 S.E.2d 593 (S.C. 1997).

State v. Short, 511 S.E.2d 358 (S.C. 1999).

Brightman v. State, 520 S.E.2d 614 (S.C. 1999).

Jackson v. State, 535 S.E.2d 926 (S.C. 2000).

State v. McFadden, 539 S.E.2d 387 (S.C. 2000).

Evins v. Richland County Historic Pres. Comm'n, 532 S.E.2d 876 (S.C. 2000).

Unisys Corp. v. S.C. Budget & Control Bd. Div. of Gen. Serv. Info. Tech. Mgmt. Office, 551 S.E.2d 263 (S.C. 2001).

Munoz v. Green Tree Fin. Corp., 542 S.E.2d 360 (S.C. 2001).

State v. Parker, 571 S.E.2d 288 (S.C. 2002).

Joseph v. State, 571 S.E.2d 280 (S.C. 2002).

Sabb v. S.C. State Univ., 567 S.E.2d 231 (S.C. 2002).

Ga. Dep't of Transp. v. Jasper County, 586 S.E.2d 853 (S.C. 2003).

Farmer v. Monsanto Corp., 579 S.E.2d 325 (S.C. 2003).

Justice John H. Waller, Jr.

State v. Easler, 489 S.E.2d 617 (S.C. 1997).

State v. Collins, 495 S.E.2d 202 (S.C. 1998).

Porter v. S.C. Pub. Serv. Comm'n, 507 S.E.2d 328 (S.C. 1998).

Concrete Serv. Inc. v. United States Fid. & Guar. Co., 498 S.E.2d 865 (S.C. 1998).

Al-Shabazz v. State, 527 S.E.2d 742 (S.C. 1999).

Lewis v. Local 382, Int'l Bhd. of Elec. Workers, 518 S.E.2d 583 (S.C. 1999).

I'ON, L.L.C. v. Town of Mt. Pleasant, 526 S.E.2d 716 (S.C. 2000).

Olson v. Faculty House of Carolina, Inc., 580 S.E.2d 440 (S.C. 2003).

State v. Gordon, 588 S.E.2d 105 (S.C. 2003).

Justice E.C. Burnett, III.

Meyer v. Paschal, 498 S.E.2d 635 (S.C. 1998).

Stevenson v. State, 516 S.E.2d 434 (S.C. 1999).
State v. 192 Coin-Operated Video Game Mach., 525 S.E.2d 872 (S.C. 2000).
Joiner v. Rivas, 536 S.E.2d 372 (S.C. 2000).
Boone v. Boone, 546 S.E.2d 191 (S.C. 2001).
Chief Justice Jean Hoefer Toal
Lester v. Dawson, 491 S.E.2d 240 (S.C. 1997).
Robinson v. State, 495 S.E.2d 433 (S.C. 1998).
State v. Kennerly, 524 S.E.2d 837 (S.C. 1999).
Franklin v. Catoe, 552 S.E.2d 718 (S.C. 2001).
Justice Costa M. Pleicones
Myrtle Beach Hosp. Inc. v. City of Myrtle Beach, 532 S.E.2d 868 (S.C. 2000).
State v. Watson, 563 S.E.2d 336 (S.C. 2002).
St. Andrews Pub. Serv. Dist. v. City Council of the City of Charleston, 564 S.E.2d 647 (S.C. 2002).
Former Chief Justice Ernest A. Finney, Jr.
Tobias v. Sports Club Inc., 504 S.E.2d 318 (S.C. 1998).
Per Curiam
R.L. Jordan Co., Inc. v. Boardman Petroleum, Inc., 527 S.E.2d 763 (S.C. 2000).

APPENDIX B

Criminal Cases Overruling Past Precedent Analyzed: 1997-2003

Justice James E. Moore
State v. Short, 511 S.E.2d 358 (S.C. 1999).
Brightman v. State, 520 S.E.2d 614 (S.C. 1999).
Jackson v. State, 535 S.E.2d 926 (S.C. 2000).
State v. McFadden, 539 S.E.2d 387 (S.C. 2000).
State v. Parker, 571 S.E.2d 288 (S.C. 2002).
Joseph v. State, 571 S.E.2d 280 (S.C. 2002).
Justice John H. Waller, Jr.
State v. Easler, 489 S.E.2d 617 (S.C. 1997).
State v. Collins, 495 S.E.2d 202 (S.C. 1998).
Al-Shabazz v. State, 527 S.E.2d 742 (S.C. 1999).
State v. Gordon, 588 S.E.2d 105 (S.C. 2003).
Justice E.C. Burnett, III.
Stevenson v. State, 516 S.E.2d 434 (S.C. 1999).
State v. 192 Coin-Operated Video Game Mach., 525 S.E.2d 872 (S.C. 2000).

Chief Justice Jean Hoefer Toal
Robinson v. State, 495 S.E.2d 433 (S.C. 1998).
State v. Kennerly, 524 S.E.2d 837 (S.C. 1999).
Justice Costa M. Pleicones
State v. Watson, 563 S.E.2d 336 (S.C. 2002).